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No. 73-432

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTHONY ESPOSITO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ANTHONY ESPOSITO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Anthony Esposito, defendant-appellee in the court below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Opinions Below

The opinion of the Seventh Circuit, not yet reported, is set forth in Appendix 1. The unreported memorandum opinion and order of the District Court in this case from which the appeal to the Seventh Circuit was prosecuted by the government, is set forth in Appendix 2.

Jurisdiction

The opinion and judgment of the Court of Appeals for the Seventh Circuit were entered on June 12, 1973. A petition for rehearing was denied on August 7, 1973 (Appendix 3), and the judgment became final on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Under the newly amended Criminal Appeals Act (18 U.S.C. § 3731), is the Government permitted to appeal from a post-trial order arresting judgment?

2. Was the district court's order an arrest of judgment, an acquittal, or a directed verdict of not guilty? Included in this question is whether the district court in reality acquitted defendant because the court relied upon facts which are outside the indictment and plea, and which came to the Court's attention solely as a result of evidence introduced at trial?

3. Did Congress have a rational basis for including cocaine within the scope of federal regulation of intrastate activities in the Controlled Substances Act of 1970 (21 U.S.C. §841)?

Statutes Involved

The Fifth Amendment to the United States Constitution provides in part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy. . . ."

The Criminal Appeals Act, as amended effective January 2, 1971 (18 U.S.C. § 3731), provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indict-

ment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

The Criminal Appeals Act prior to its 1971 Amendment provided in part as follows (18 U.S.C. § 3731):

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, where the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section."

The Controlled Substances Act of 1970 provides in pertinent part as follows (21 U.S.C. § 841):

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ."

STATEMENT OF THE CASE

Petitioner was indicted on October 26, 1971. The indictment (set forth in full in Appendix 4) charged Mr. Esposito in two counts with distribution and possession with intent to distribute 206.5 milligrams of cocaine, in violation of 21 U.S.C. § 841.

The case was tried before a jury. During its case in chief, the prosecution called a government informer who testified that he was a friend of petitioner, that he set up a number of meetings with petitioner in June, 1971, and that at one of those meetings petitioner, at the informer's request, delivered to the informer a small amount of a substance which the informer understood to be cocaine. The government also called several federal narcotics agents who testified to their observations of the meetings between petitioner and the informer and to recordings made from electronic eavesdropping which was conducted of the conversations between petitioner and the informer. The government called a chemist to testify that he analyzed the substance which had been delivered by petitioner to the informer and found that it weighed 206.5 milligrams, 47% of which was cocaine.

At the close of the government's case in chief, petitioner moved for a judgment of acquittal on the ground (inter alia) that the government had not proved interstate transportation. This motion was denied.

Petitioner introduced evidence, including his own testimony. No rebuttal evidence was offered by the government. At the close of all the evidence, petitioner moved for judgment of acquittal, and the trial judge reserved ruling on the motion.

The jury returned a verdict of guilty on both counts. Thereafter, petitioner filed motions for new trial and in arrest of judgment. The District Judge granted petitioner's motion in arrest of judgment. His opinion (Appendix 2) states in pertinent part (App. 12):

> "In the case at bar the government made no attempt to prove that the cocaine in defendant's possession was of foreign or interstate origin. The almost infinitesimal quantity of cocaine involved herein (47% of approximately 206.5 milligrams) is clearly in and of itself insufficient to raise any presumption of being in interstate commerce or of having any perceptible effect on interstate commerce. *Cf. Leary* v. *United States*, 395 U.S. 6 (1969). The fact that the defendant 'distributed' this cocaine to a friend does not advance the government's case. The court finds and concludes that the offense of which this defendant stands convicted is not one against the Federal government or one which Congress has power to prohibit in the manner attempted by 21 U.S.C. § 841.
>
> "The defendant's Motion in Arrest of Judgment is therefore granted."

The government appealed. The Court of Appeals for the Seventh Circuit reversed and vacated the trial court's order, and remanded the case for entry of a judgment in accordance with the jury verdict. (Appendix 1.)

The Court of Appeals rejected petitioner's argument that the District Court's order was not one from which the government was entitled to appeal under the newly amended Criminal Appeals Act. (18 U.S.C. §3731.) The Court held that although the government's right to appeal in criminal cases is now "limited to dismissals of indictments", the trial judge's post-trial order arresting

judgment was ". . . tantamount to the dismissal of an indictment. It comes, therefore, within the meaning of 'dismissal' as used in §3731, and is appealable." (App. 7.)

The Court held that the District Court had not acquitted petitioner by relying on evidentiary matters, but rather had merely recited certain evidence ". . . to provide a framework for the decision on the constitutionality of the statute." (App. 4, fn. 3.)

The Court of Appeals also held that a valid basis exists for Congress to control purely intrastate transactions in cocaine in the Controlled Substances Act of 1970. (21 U.S.C. §841.)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PRESENTS A SUBSTANTIAL AND NOVEL QUESTION REGARDING THE GOVERNMENT'S RIGHT OF APPEAL UNDER THE NEWLY AMENDED CRIMINAL APPEALS ACT (18 U.S.C. §3731).

This Court has not yet rendered an opinion with respect to this important statute, which took effect on January 2, 1971.

The court below has expanded the literal scope of §3731 to permit prosecution appeals not only from orders "dismissing an indictment" (specifically referred to in the Act), but also from orders which are "tantamount to dismissal." We submit that this interpretation of the new statute is erroneous because:

(1) There is a clear and well-settled distinction between the pre-trial dismissal of an indictment and the post-trial arrest of a judgment. Congress recognized that distinction in the prior appeals statute, but *deleted* from the new Act the authority for government appeals from orders and arresting "a decision arresting judgment of conviction." *

(2) Moreover, in adopting the new Act, Congress *deleted* from the proposed bill language which would have extended the government's right to appeal to all orders "terminating a prosecution in favor of a defendant" other than acquittals. (S. 3132, H.R. 14588, 91st Cong. 1st Sess. 1969.) Instead, Congress limited the government's right to appeal to orders "dismissing an indictment."

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* We quote in full the applicable provisions of the repealed statute at page 3 above.

These two facts of legislative history cannot be reconciled with the Court of Appeal's ruling that Congress intended the new act to encompass post-trial orders in arrest of judgment which the court deems "tantamount to the dismissal of an indictment." (App. 7.)

(3) Furthermore, the Court's conclusion flies in the teeth of a fundamental principle it recognized earlier in its opinion (App. 6), "that the Criminal Appeals Act is to be strictly construed against the Government, *Will* v. *United States,* 389 U.S. 90, 97 (1967) . . ."

An order arresting judgment is a familiar judicial act, explicitly authorized in Rule 34 of the Federal Rules of Criminal Procedure. See *United States* v. *Sisson,* 399 U.S. 267, 280-2 (1970). An order arresting judgment is obviously different from one which dismisses an indictment, and therefore is not one from which the Government may appeal.

Instead of interpreting the plain language of the Act "strictly" and "against the government," the Court of Appeals stretched Congress' words so as to accomplish a result the Court deemed desirable, but which is simply not warranted by the words which Congress used. However tempting, this is not the function of courts.

We respectfully pray that this Court accept for review this important case of first impression, in order to clarify the scope of the government's right of appeal under the new Criminal Appeals Act.

II.

PETITIONER WAS ACQUITTED. THE GOVERNMENT'S APPEAL VIOLATED PETITIONER'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE.

Petitioner argued below that the District Court's order was an acquittal, precluding appeal, because the trial judge based his post-trial ruling in part upon evidence introduced at the trial.

The Court of Appeals agreed with petitioner's view of the law (App. 3):

> "For jeopardy purposes the question to be decided is whether the trial court 'bottomed' his order 'on factual conclusions not found in the indictment' or 'on the basis of evidence adduced at trial.' *United States v. Sisson*, 399 U.S. 267, 288 (1970). If the court's order 'arresting judgment' is based upon evidence produced at trial, it is in the nature of an acquittal and is not appealable under the double jeopardy clause."

The Court held, however, "that the trial judge did not base his order on the evidence adduced at trial." (App. 3.)

In Appendix 4 we set out the indictment. The Court will find nothing in the indictment relating to (1) the informer being a "friend" of petitioner, or (2) the quantity of cocaine involved in the case, *viz.*, "47% of approximately 206.5 milligrams." (App. 12.) Those facts appear only in the trial testimony. The Court of Appeals was simply wrong in saying that "The facts as they are set forth in the order appealed here were taken from the indictment . . ." (App. 5, fn. 3.)

The Court of Appeals' reliance on *United States* v. *Brewster*, 408 U.S. 501 (1972) (App. 4, fn. 3), is misplaced. In *Brewster*, the trial judge referred generally to "the

facts of this case''—which this Court construed to mean ''the facts alleged in the indictment'' (408 U.S. at 507)—whereas the trial judge here made explicit reference to, and relied upon, facts which came to his knowledge only from testimony introduced at the trial.

We respectfully submit that petitioner's rights under the Double Jeopardy Clause have been violated, and that the Court of Appeals has deviated from this Court's ruling in *United States* v. *Sisson,* 399 U.S. 267 (1970), warranting the Court in accepting this case for plenary review.

III.

THIS CASE PRESENTS THE IMPORTANT ISSUE OF FIRST IMPRESSION OF WHETHER CONGRESS HAS A VALID LEGISLATIVE BASIS FOR CONTROLLING INTRASTATE TRANSACTIONS IN COCAINE.

The constitutional question raised here relates to that portion of the Controlled Substances Act of 1970 which regulates intrastate transactions in cocaine (18 U.S.C. §841 (a)(1).) We submit that there is no rational basis for including cocaine within the congressional finding that effective regulation of interstate transactions in certain drugs requires regulation of intrastate dealings in those drugs.

We begin with the principle that, under the Commerce Clause, Congress may control intrastate transactions if *but only if* there is a rational legislative basis to justify extension of federal power to intrastate activities. See, e.g., *Perez* v. *United States,* 402 U.S. 146 (1971); *United States* v. *Darby,* 312 U.S. 100 (1941). The burden is on Congress to demonstrate the need to extend its powers to intrastate activities.

Congress made no attempt to legislate with regard to intrastate transactions in cocaine until 1970 when it enacted the Controlled Substances Act. * That Act contains findings explaining why Congress must control intrastate transactions in the controlled drugs (21 U.S.C. §801); those findings are reproduced in Appendix 5.

Our position is simply this—regardless of the basis Congress had for making these findings as to other drugs (such as heroin), no rational basis exists for these findings as they relate to *cocaine.*

We cite in the footnote the various hearings, reports, materials and debates relating to the Act.** The Court will find that the congressional hearings elicited a great volume of evidence relating to drugs such as amphetamines, barbituates and marijuana. The Court will also find, however, only a few references to cocaine, none of which supports

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* 18 U.S.C. §§1114, 1952 (1970); 21 U.S.C. §§321, 333-334, 360, 372, 381, 801-803, 811-812, 821-829, 841-851, 871-886, 901-904 (1970); 42 U.S.C. 242 (1970).

** 116 Cong. Rec. 33609 (1970). *See, also,* 116 Cong. Rec. 33603-667, 35475-490, 35494-497, 35506-511, 35516-539, 35549-560, 35562-563, 36651-655, 36880-885 (1970). Hearings on H.R. 13742 and H.R. 17436 before the House Committee on Ways & Means, 91st Cong., 2d Sess. (1970); Hearings on S. 1895, S. 2590 and S. 2637 before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee of the Judiciary, 91st Cong., 1st Sess. (1969). Hearings on S. 1816 and S. 2608 before the Special Subcommittee on Alcoholism & Narcotics of the Senate Committee on Labor & Public Welfare, 91st Cong., 1st Sess. (1969); Hearings on S. 3562 before the Special Subcommittee on Alcoholism & Narcotics of the Senate Committee on Labor & Public Welfare, 91st Cong., 2d Sess. (1970). Hearings on H.R. 11704 and H.R. 18743 before the Subcommittee on Public Health & Welfare of the House Committee on Interstate & Foreign Commerce, 91st Cong., 2d Sess. 1970). Sen. Rep. No. 91-613; 91st Cong., 1st Sess. (1969); *see also* Sen. Rep. No. 91-1341; 91st Cong., 2d Sess. (1970); H. Rep. No. 91-1444, 91st Cong., 2d Sess. (1970).

the legislative finding that intrastate distribution of cocaine must be controlled in order that interstate distribution of that drug can effectively be controlled.

In the cases in which this Court has upheld statutes governing intrastate transactions, the Court has cited detailed congressional findings which support the basis for federal action under the Commerce Clause.* There are no such findings relating to cocaine in the materials which form the basis for the statute enacted in 1970.

The courts which have ruled on this issue have not made a careful search for a rational legislative basis for control of intrastate transactions in cocaine.** The court below merely cited two prior cases, one of which is not in point.

The importance of the fundamental issue involved is obvious. The question is of nationwide and immediate concern. We respectfully pray for a full review on the merits by the Court.

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* E.g., *Perez* v. *United States*, 402 U.S. 146, 155-157 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-304 (1964); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119-121 (1942); *Wickard* v. *Filburn*, 317 U.S. 111, 118-128 (1942); *United States* v. *Darby*, 312 U.S. 100, 119-121 (1941).

** *United States* v. *Lopez*, 459 F.2d 949 (5th Cir. 1972), cert. denied 93 S.Ct. 130; *United States* v. *Lane*, 461 F.2d 343 (5th Cir. 1972); *United States* v. *Mather*, 465 F.2d 1035 (5th Cir. 1972); *United States* v. *Warwar*, 346 F.Supp. 90 (D.P.R. 1972). The Court below relied on *Lopez* and a case which is not in point because it involved marijuana—*United States* v. *Scales*, 464 F.2d 371 (6th Cir. 1972).

Conclusion

For the reasons set forth above, petitioner Anthony Esposito prays that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit in this case.

Respectfully submitted,

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September 6, 1973.

APPENDIX

APPENDIX 1

Opinion of the Court of Appeals for the Seventh Circuit, June 12, 1973

(No. 72-1825)

Before SWYGERT, *Chief Judge*, KILEY, *Circuit Judge*, and BARNES, *Senior Circuit Judge.* *

SWYGERT, *Chief Judge.* Defendant-appellee Anthony Esposito was charged in a two count indictment with the possession and distribution of 206.5 milligrams of cocaine in violation of 21 U.S.C. §841. Following a trial before a jury, he was found guilty on both counts. Esposito then moved for a new trial or, in the alternative, for an arrest of judgment on the ground that the Government had failed to prove any connection between the offense charged and interstate commerce. The district court denied the motion for a new trial but granted the motion for arrest of judgment, holding that the "offense of which this defendant stands convicted is not one against the federal government, or one which Congress has power to prohibit in the manner attempted by 21 U.S.C. §841." The Government appeals.

I.

The threshold question is one of appealability. Under the 1971 amendment to the Criminal Appeals Act, 18 U.S.C. §3731, can the Government appeal from the district court's order?

Section 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or

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* Senior Circuit Judge Stanley N. Barnes of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

> **order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.**

The Government's right to appeal trial orders terminating criminal prosecutions is limited by §3731 and the double jeopardy clause of the fifth amendment. The jeopardy clause stands as an absolute prohibition against Government appeals where jeopardy is found to have attached. Although Congress has no power to expand the Government's right to appeal beyond the prohibition of the jeopardy clause, it does have the power to further limit it.[1] That being true, the question of appealability in cases such as this is best approached by a two part inquiry. Initially the question is whether jeopardy in fact attached. If it did,

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[1] Referring to the original Criminal Appeals Act of 1907, Act of March 2, 1907, c. 2564, 34 Stat. 1246, the majority in *United States* v. *Sisson*, 399 U.S. 267 (1970), noted Congress' intent to "restrict" the Government's right to appeal in criminal cases to "enumerated circumstances":

> In this regard, the legislative history reveals a strong current of congressional solicitude for the plight of a criminal defendant exposed to additional expense and anxiety by a government appeal and the incumbent possibility of multiple trials. Criminal appeals by the Government "always threaten to offend the policies behind the double-jeopardy prohibition," *Will* v. *United States*, *supra*, at 96, even in circumstances where the Constitution itself does not bar retrial. Out of a collision between this policy concern, and the competing policy favoring review, Congress enacted a bill that fully satisfied neither the Government nor the bill's opponents. For the Criminal Appeals Act, thus born of compromise, manifested a congressional policy to provide review in certain instances but no less a congressional policy to restrict it to the enumerated circumstances. 399 U.S. at 298-99.

the prosecution is at an end and no appeal is available to the Government; if it did not, the second inquiry, involving the interpretation of §3731 and its application to the specific facts of the case, is required.

For jeopardy purposes the question to be decided is whether the trial court "bottomed" his order "on factual conclusions not found in the indictment" or "on the basis of evidence adduced at trial." *United States* v. *Sisson*, 399 U.S. 267, 288 (1970). If the court's order "arresting judgment" is based upon evidence produced at trial, it is in the nature of an acquittal and is not appealable under the double jeopardy clause.

A review of the record here shows that the trial judge did not base his order on the evidence adduced at trial. Jeopardy did not, therefore, attach and this appeal is not constitutionally barred. The challenged order was limited to the court's conclusion that unless adequate connection between the conduct sought to be regulated and interstate commerce is alleged and proved, prosecution under the statute is an invalid exercise of federal power.[2] The court, in arriving at that conclusion, did not need to, and indeed did not, rely on the evidence produced by

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[2] The court's order, which deals in length with Congress' attempt to regulate cocaine without requiring proof of a connection with interstate commerce, summarizes:

> The court finds and concludes that the offense of which this defendant stands convicted is not one against the Federal government or one which Congress has power to prohibit in the manner attempted by 21 U.S.C. §841. The defendant's Motion in Arrest of Judgment is therefore granted.

either party. The indictment contained a narrative of virtually every fact recited in the order[3] and there was

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[3] The defendant's contention that the court's detailing of the amount and percentage of cocaine involved shows reliance on the evidence, and thus, jeopardy, does not convince us that this case is controlled by *Sisson*. In denying the Government the right to appeal the trial court's arrest of judgment in Sisson's trial for refusing induction, the Supreme Court stated:

> The court below clearly went beyond the "face of the record" in reaching its decision. As noted earlier, the opinion explicitly relies upon the evidence, adduced at the trial, including demeanor evidence, for its findings that Sisson was "sincere" and that he was "as genuinely and profoundly governed by his conscience" as a religious conscientious objector. 399 U.S. at 283.

The trial court's use of the factual allegations of the indictment is considerably different in the instant case. Given the nature of the court's holding, we are persuaded that the recitation of the facts was merely designed to provide a framework for the decision on the constitutionality of the statute. As such, this case is more akin to *United States* v. *Brewster*, 408 U.S. 501 (1972). There, the district court dismissed certain counts charging Senator Brewster with bribery on the theory that the speech and debate clause of the Constitution shielded the defendant from prosecution. The Government appealed and the defendant responded that jeopardy prohibited appeal because the trial judge had explicitly relied on the facts of the case. Despite the fact that the trial judge stated in his order, "based upon the facts of this case," the Supreme Court held the dismissal appealable:

> Appellee contends that the statement "based on the facts of this case," used by the District Judge in announcing his decision, shows reliance on the Government's outline of its case. We read the District Judge's reference to "facts," in context, as a reference to the facts alleged in the indictment, and his ruling as holding that Members of Congress are totally immune from prosecution for accepting bribes for the performance of official, *i.e.*, legislative, acts by virtue of the Speech or Debate Clause.

Footnote Continued

neither allegation nor proof of a connection with interstate commerce. Further, it is clear from the order that the court concluded that the fatal defect in the prosecution lay in the indictment's failure to state and the statute's failure to require a nexus with interstate commerce which would justify federal regulation. The fact that the prosecution failed to prove such a connection, though alluded to in the order, was of no significance to the actual basis for the decision. The order was neither based upon nor limited in application to the facts of the case. Appeal, therefore, is not barred by the double jeopardy clause of the fifth amendment.

The defendant also argues that this appeal is barred by the clear and unambiguous language of §3731. We disagree.

The predecessor of the present Appeals Act, Pub. L. 90-351 (1968), contained express provisions that permitted appeals by the government from various trial court orders which "terminated" prosecutions, including "arrests of judgment." The present section contains no such provision. It is limited to dismissals of indictments. The Gov-

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(Footnote continued)

> Under that interpretation of §201, it cannot be applied to a Member of Congress who accepts bribes that relate in any way to his office. We conclude, therefore, that the District Court was relying only on facts alleged in the indictment and that the dismissal of the indictment was based on a determination that the statute on which the indictment was drawn was invalid under the Speech or Debate Clause. As a consequence, this Court has jurisdiction to hear the appeal. 408 U.S. at 507.

The facts as they are set forth in the order appealed here were taken from the indictment and cannot be used as a vehicle to invoke jeopardy protections where the true gravamen of the decision is limited to the constitutionality of a particular criminal statute. *Cf. United States* v. *Knox,* 396 U.S. 77, 79 (1969).

ernment argues that appeals are permissible under the present §3731 from any order except an acquittal. The language of the statute, its legislative history, and the well established rule of construction that the Criminal Appeals Act is to be strictly construed against the Government, *Will* v. *United States*, 389 U.S. 90, 97 (1967), all compel the rejection of that expansive interpretation.[4] Nevertheless, the fact that we read §3731 as permitting appeals only from dismissals of indictments does not resolve the question that is presented here. Although the trial judge labelled his order an "arrest of judgment," it remains for us to determine whether that characterization is correct, and, if so, whether an arrest of judgment under the circumstances of this case is equivalent to the dismissal of an indictment. We answer both questions in the affirmative.

The order in question was properly designated an arrest of judgment. As noted above, it was based exclusively upon allegations made in the indictment and was entered because of deficiencies in the charge against the defendant. As such, it was an "arrest of judgment" as that term was recently defined by the Supreme Court in *Sisson*.

> In using that phrase [arrest of judgment] in the Criminal Appeals Act, Congress did not, of course, invent a

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[4] The most logical interpretation of the legislative history of the present §3731 is that Congress, while intending to eliminate the "technical" distinctions in pleading, sought to limit the Government's right to appeal cases in which the indictment had been dismissed. The bills initially proposed in both the House and Senate, H.R. 14588, 91st Cong., 1st Sess. (1969) and S. 3132, 91st Cong., 1st Sess. (1969), contained a provision for appeal from dismissals of indictments and any order "terminating a prosecution in favor of a defendant. . . ." The bill which was ultimately enacted, however, contained no such provision.

> new procedural classification. Instead, Congress acted against a common-law background that gave the statutory phrase a well-defined and limited meaning. An arrest of judgment was the technical term describing the act of a trial judge refusing to enter judgment on the verdict because of an error appearing on the face of the record that rendered the judgment invalid.
>
> * * *
>
> For the purpose of this case the critical requirement is that a judgment can be arrested only on the basis of error appearing on the "face of the record," and not on the basis of proof offered at trial. 399 U.S. at 280-81.

Congress, in using the phrase in the former §3731, defined it in a manner which would encompass the instant order. Senator Nelson of Wisconsin, one of the bill's sponsors, noted that "[t]he arrest of judgment . . . is not a general motion covering all the grounds on which a judgment may be arrested. It is simply for arrest of judgment because of the insufficiency of the indictment—that is, the failure of the indictment to charge a criminal offense." 41 Cong. Rec. 2756.

Not only was the instant order an arrest of judgment, it was tantamount to the dismissal of an indictment. It comes, therefore, within the meaning of "dismissal" as used in §3731, and is appealable.

II.

Having decided that the Government may prosecute this appeal, we turn to the merits. The district court concluded that Congress had no power to regulate the use and distribution of cocaine without requiring proof in each prosecution of some connection with interstate commerce. We hold that it erred in so doing.

The arguments made by the defendant and accepted by the trial court have previously been rejected by both the Fifth and Sixth Circuits. *United States* v. *Scales*, 464 F.2d 371 (6th Cir. 1972); *United States* v. *Lopez*, 459 F.2d 949 (5th Cir. 1972). We concur in the reasoning of those cases and reject the conclusion of the district court in this case.

For this reason, the order of the district court is reversed and vacated and the cause is remanded for entry of judgment in accordance with the jury's verdict.

APPENDIX 2

Order of District Court, July 14, 1972
(No. 71 CR 980)

ORDER

The defendant on March 17, 1972 filed a motion for a new trial, and the government has filed an answer thereto. Neither party has elaborated on the bare bones of the defendant's motion and has not directed the Court's attention to any prejudicial error committed during the trial of this case. The court is not aware of any grounds for granting a new trial, and the deefndant's motion filed March 17, 1972 is therefore denied.

On April 24, 1972 the defendant filed a Motion for a New Trial Based on Newly Discovered Evidence, arising out of the allegedly inconsistent testimony of government witness Haight who testified subsequently in case 72 CR 178. The court finds that the testimony of the government witness in the later case is not substantially contradictory to his testimony in the case at bar, according to the excerpts supplied in defendant's Motion for a New Trial. Nor was that witness an occurrence witness against defendant but was corroborative of the government's case in chief.

The rule in the Seventh Circuit and in the federal courts generally is that a new trial should not be granted on the ground of newly discovered evidence relating to the merits unless that evidence would probably result in an acquittal. *United States* v. *Spencer,* 415 F.2d 1301 (7th Cir. 1969); *United States* v. *Balistrieri,* 436 F.2d 1212 (7th Cir. 1971). The test is more liberal if the evidence is such that the court believes a government witness committed perjury or if he recants. In such an event a new trial should be

granted if the outcome of a new trial *might* be different. *Larrison* v. *United States,* 24 F.2d 82 (7th Cir. 1928); *United States* v. *Higgins,* 412 F.2d 789 (7th Cir. 1969). This court finds that the evidence in question was not material to the main issue of defendant's guilt and was not perjured. Since the newly discovered evidence is at most impeaching on a collateral matter and since in the court's opinion it would not change the outcome of the case at bar, the defendant's motion for a new trial based on newly discovered evidence is denied.

The defendant has also filed a Motion in Arrest of Judgment on the ground that Title 21, *United States Code,* Section 841 is not a valid exercise of congressional power and that the court therefore lacked jurisdiction over the alleged offense. Defendant contends that the possession and gratuitous distribution of 206.5 milligrams of cocaine within a state is not sufficiently connected with interstate commerce to give Congress jurisdiction over this particular act.

Congress apparently sought to exercise control over cocaine by virtue of its power over interstate and foreign commerce and not by exercise of its power to tax, or even by its treaty making power. In enacting Section 814, Congress made the following "findings and declarations":

> (1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
>
> (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
>
> (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce.

Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances. [21 U.S.C. §801]

In making the foregoing general statement, Congress was apparently attempting to overcome the effect of *Turner* v. *United States*, 396 U.S. 398 (1970) which had been de-

cided several months before the new statute was enacted. The Supreme Court specifically differentiated cocaine from certain other narcotic drugs and held invalid the presumption that cocaine is necessarily smuggled in this country from abroad or moves in interstate commerce. It found as a fact that much more cocaine is lawfully produced in this country than is smuggled in. 396 U.S. 418. Congress made no finding to the contrary and merely made some general observations and conclusions concerning a large number of controlled drugs.

In the case at bar the government made no attempt to prove that the cocaine in defendant's possession was of foreign or interstate origin. The almost infinitesimal quantity of cocaine involved herein (47% of approximately 206.5 milligrams) is clearly in and of itself insufficient to raise any presumption of being in interstate commerce or of having any perceptible effect on interstate commerce. Cf. *Leary* v. *United States,* 395 U.S. 6 (1969). The fact that defendant "distributed" this cocaine to a friend does not advance the government's case. The court finds and concludes that the offense of which this defendant stands convicted is not one against the Federal government or one which Congress has power to prohibit in the manner attempted by 21 U.S.C. §841.

The defendant's Motion in Arrest of Judgment is therefore granted.

Enter:

Thomas R. McMillen
Judge, U. S. District Court

APPENDIX 3

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 6, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. STANLEY N. BARNES, Sr. Circuit Judge*
Hon. ROGER J. KILEY, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

No. 72-1825 vs.

ANTHONY ESPOSITO,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
(71 CR 980)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

* Hon. Stanley N. Barnes, Sr. Circuit Judge for the Ninth Circuit.

APPENDIX 4

Indictment

COUNT I

"On or about the 23rd day of June, 1971, in the Northern District of Illinois, Eastern Division,

ANTHONY ESPOSITO,

defendant herein, knowingly and intentionally did possess, with the intent to distribute, about 206.5 milligrams, more or less, of a substance containing cocaine, a Schedule II narcotic drug controlled substance;

In violation of Title 21, United States Code, Section 841."

COUNT II

"On or about the 23rd day of June, 1971, in the Northern District of Illinois, Eastern Division,

ANTHONY ESPOSITO,

defendant herein, knowingly and intentionally did distribute about 206.5 milligrams, more or less, of a substance containing cocaine, a Schedule II narcotic drug controlled substance;

In violation of Title 21, United States Code, Section 841."

APPENDIX 5

18 U.S.C. §801

"(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

"(A) after manufacture, many controlled substances are transported in interstate commerce.

"(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

"(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

"(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

"(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

"(6) Federal control of the intrastate incidents of traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."

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Supreme Court, U. S.
FILED
DEC 4 1973
MICHAEL RODAK, JR., CLERK

No. 73-432

In the Supreme Court of the United States

OCTOBER TERM, 1973

ANTHONY ESPOSITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
ROBERT H. PLAXICO,
Attorneys;
Department of Justice,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1973. A petition for rehearing was denied on August 6, 1973 (Pet. App. 13). The petition for a writ of certiorari was not filed until September 6, 1973, and was accordingly out of time under Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Whether the government was barred by 18 U.S.C. 3731 or the double jeopardy clause of the Fifth Amendment from appealing a decision of the district court, denominated as an order in "arrest of judgment," which sustained a defense to the indictment.

2. Whether Congress could rationally find that it was empowered to regulate intrastate transactions in cocaine on the ground that such transactions affect interstate commerce.

STATUTES INVOLVED

18 U.S.C. 3731 provides in part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

21 U.S.C. 841 provides:

> (a) *Unlawful acts.*
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or * * *.

STATEMENT

Petitioner was found guilty by a jury in the United States District Court for the Northern District of Illinois on a two-count indictment charging possession with intent to distribute and distribution of cocaine, a controlled substance, in violation of 21 U.S.C. 841. The evidence which resulted in the jury's guilty verdict showed that petitioner provided a gov-

ernment informer with 206.5 milligrams of a substance later determined to consist of 47% cocaine.

After the jury's verdict was announced, the trial judge granted petitioner's motion for an order in "arrest of judgment," ruling that "Section 841 is not a valid exercise of congressional power and that the court therefore lacked jurisdiction over the alleged offense" (Pet. App. 10). The basis for the motion was that Section 841 did not require in each case a specific showing that the substance possessed or distributed was of interstate or foreign origin (Pet. App. 12). The United States appealed to the court of appeals, which reversed the district court and remanded the case for entry of judgment in accordance with the jury's verdict (Pet. App. 1).

ARGUMENT

1. Petitioner claims that the order of the district court, which the court of appeals held "was tantamount to the dismissal of an indictment" (Pet. App. 7), is not appealable under the Criminal Appeals Act (18 U.S.C. 3731), which authorizes an appeal to the court of appeals from "a decision, judgment, or order of a district court dismissing an indictment * * * except that no appeal shall lie where the double jeopardy clause * * * prohibits further prosecution."

Petitioner contends that an arrest of judgment cannot be "tantamount to the dismissal of an indictment" because "[a]n order arresting judgment is obviously different from one which dismisses an indictment * * * " (Pet. 8). The fact is, however, that the only distinction between the two orders is historical

and depends largely on the point in the proceeding at which a defense is raised.

The Federal Rules of Criminal Procedure provide two methods for challenging the sufficiency of an indictment or the jurisdiction of the court to try the offense. Pursuant to Rule 12(b)(1), a defendant may raise such a defense by motion prior to trial, which, if granted, results in the entry of an order dismissing the indictment. Such an order, as petitioner concedes, is clearly appealable.

When the same defense is raised after a guilty verdict has been returned, the traditional vehicle is by way of a motion in "arrest of judgment" pursuant to Rule 34, Fed. R. Crim. P. If the defense is sustained, it results in the entry of an order ending the prosecution in a manner indistinguishable from a dismissal. The different label is largely based on the early common-law procedure for raising post-trial defenses. As explained in 4 Blackstone, *Commentaries,* p. 1756 (Lewis ed., 1900):

> We are now to consider the next stage of criminal prosecution, after trial and conviction are past * * * which is that of *judgment.* For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner, he is, either immediately, or at a convenient time soon after, asked by the court if he has anything to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared), a *capias* is awarded and issued

> to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But, whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment in *arrest* or stay of judgment; as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. [Footnotes omitted.]

While this "venerable" procedure has been preserved in name and form under the Federal Rules of Criminal Procedure as a separate post-trial remedy (see *United States* v. *Sisson*, 399 U.S. 267, 281–282), there is no reasonable basis for declining to treat arrests of judgment "as tantamount to the dismissal of an indictment" for purposes of the Criminal Appeals Act. As the Court held in *Sisson* (*id.* at 279, n. 7):

> The label attached by the District Court to its own opinion does not, of course, decide for us the jurisdictional issue, however. "We must be guided in determining the question of appealability of the trial court's action not by the name the court gave [its decision] but by what in legal effect it actually was."

Moreover, the construction placed on Section 3731 by the court of appeals is compelled by that provision's language and history. Particularly pertinent here is the command of Section 3731 (omitted by petitioner from the "pertinent part" of the statute set

forth at pp. 2–3 of the petition) that "[t]he provisions of this section shall be liberally construed to effectuate its purposes." As the Senate Judiciary Committee Report (S. Rep. No. 91–1296, 91st Cong., 2d Sess., p. 18) states:

> The amended Criminal Appeal Act is intended to be liberally construed so as to effectuate its purpose of permitting the Government to appeal from dismissals of criminal prosecutions by district courts in all cases where the Constitution permits,[1] and from all suppressions and exclusions of evidence in criminal proceedings, except those ordered during trial of an indictment or information. S. 3132 places on the face of section 3731 an explicit expression of this intent, in view of the restrictive judicial interpretations of congressional intent which have resulted from the histories of the earlier versions of section 3731 despite strong indications in the debate on the 1907 act that it should be broadly interpreted.

See also *United States* v. *Goldstein*, 479 F. 2d 1061, 1065 (C.A. 2), certiorari denied, No. 73–3, October 9, 1973.

Petitioner attaches some significance, however, to the fact that the old Criminal Appeals Act specifically

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[1] There can, of course, be no claim that an appeal by the government from an order granting a motion in arrest of judgment violates the double jeopardy clause of the Constitution, since a successful appeal does not involve a retrial, but merely the entry of a judgment of conviction in accordance with the verdict of the jury. Indeed, appeals from such orders were entertained by this Court under the old Criminal Appeals Act. See *United States* v. *Sisson*, *supra*, 399 U.S. at 280–281.

referred to orders in arrest of judgment,[2] while the present act merely speaks of "decisions, orders and judgments" dismissing indictments. But one of the reasons for the change in wording was precisely because the "clear and well-settled distinction between * * * dismissal[s] of * * * indictment[s] and * * * arrest[s] of * * * judgment[s]" (Pet. 7) was never, in fact, readily discernible. Consequently Congress, prompted by this Court's decision in *Sisson*, deemed it advisable to eliminate distinctions as to common law categories of pleadings. As this Court noted in *Sisson*, 399 U.S. at 307–308:

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[2] The pre-1971 version of the Act reads as follows (18 U.S.C. (1964 ed., Supp. V) 3731):

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

> * * * [T]he Criminal Appeals Act is a failure. Born of compromise, and reflecting no coherent allocation of appellate responsibility, the Criminal Appeals Act [prior to the 1971 amendment] proved a most unruly child that has not improved with age. The statute's roots are grounded in pleading distinctions that existed at common law but which, in most instances, fail to coincide with the procedural categories of the Federal Rules of Criminal Procedure. Not only does the statute create uncertainty by its requirement that one analyze the nature of the decision of the District Court in order to determine whether it falls within the class of common law distinctions for which an appeal is authorized, but it has also engendered confusion over the court to which an appealable decision should be brought. [Footnotes omitted.]

Moreover, if petitioner's construction of Section 3731 were accepted, it would give the 1971 amendment the effect of cutting back substantially on the categories of rulings from which appeals are authorized, when in fact the principal purpose of the 1971 amendment was to overcome the restrictive judicial construction of the old act, which, ignoring the plain language of Section 3731, engrafted numerous limitations on the right of the United States to appeal from district court orders sustaining defenses to indictments. As the Senate Committee Report explained (S. Rep. No. 91-1296, *supra*, pp. 2-3):

> Three major problems have appeared under the Criminal Appeals Act. The first concerns the failure of the act to provide for any appeal by the Government from many frequently en-

> countered types of dismissals, and from some improper orders suppressing evidence. The second concerns the requirement under the act that an appeal in many cases be taken directly to the Supreme Court, with the result that lower court decisions which ought to be reviewed are often not appealed because they are not of sufficient general importance to warrant Supreme Court review. These problems have created serious obstacles to effective law enforcement. S. 3132, by amending the Criminal Appeals Act, will assure that the United States may appeal from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits, will permit the Government appeal from all suppression orders except those made during a trial of guilt, and will provide that * * * the appeal shall be taken first to a court of appeals.
>
> The third problem is the ambiguity and absence of settled meaning surrounding many of the statute's existing provisions, which result in a considerable and needless expenditure of prosecutive and judicial resources.

There is nothing in the detailed and comprehensive Senate Judiciary Committee Report or the debates on the bill to support petitioner's implication that Congress intended to encourage defendants to avoid raising defenses prior to trial by limiting the right of the United States to appeal post-verdict dismissals which are labeled orders in arrest of judgment.[3]

---

[3] Petitioner attempts to muster legislative history supporting his position by comparing the original Senate version of the 1971 amendments with the bill ultimately enacted. The

2. Petitioner argues alternatively that the order of the district court was an acquittal, and that an appeal is barred by the double jeopardy clause. The basis of this claim is that the district court relied "in part upon evidence introduced at trial" (Pet. 9). In rejecting this claim, the court of appeals stated (Pet. App. 3–5):

> A review of the record here shows that the trial judge did not base his order on the evi-

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original Senate bill stated (S. Rept. No. 91–1296, *supra*, p. 1): "Except as otherwise expressly provided by this section, in a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information or terminating a prosecution in favor of a defendant as to any one or more counts, except that no appeal shall lie from a judgment of acquittal." After a conference between representatives of the Senate and House, the present version was agreed upon.

Petitioner argues that the deletion of the phrase "terminating a prosecution in favor of a defendant * * * except that no appeal shall lie from a judgment of acquittal" in favor of the current "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution" evinces an intent on the part of Congress to bar appeals after a motion in arrest of judgment, because such a motion supposedly comes under the deleted provision. As the Third Circuit recently pointed out, however, while no explicit reason was given for the change (see H. Conf. Rep. No. 91–1768, 91st Cong., 2d Sess., p. 21), the most apparent reason is that the Senate version was in fact too broad in providing for appeal after any termination of a prosecution in favor of a defendant, since "double jeopardy often prohibits reprosecution after a trial begins and is terminated even though the defendant was not acquitted." *United States* v. *Pecora*, C.A. 3, No. 72–2173, decided August 31, 1973, slip op. 8, n. 6. See also *United States* v. *Jorn*, 400 U.S. 470. The change reflected in the Conference report was thus merely to confirm that the amendment was not meant to infringe upon the constitutional right against double jeopardy.

> dence adduced at trial. Jeopardy did not, therefore, attach and this appeal is not constitutionally barred. The challenged order was limited to the court's conclusion that unless adequate connection between the conduct sought to be regulated and interstate commerce is alleged and proved, prosecution under the statute is an invalid exercise of federal power. The court, in arriving at that conclusion, did not need to, and indeed did not, rely on the evidence produced by either party. The indictment contained a narrative of virtually every fact recited in the order and there was neither allegation nor proof of a connection with interstate commerce. Further, it is clear from the order that the court concluded that the fatal defect in the prosecution lay in the indictment's failure to state and the statute's failure to require a nexus with interstate commerce which would justify federal regulation. The fact that the prosecution failed to prove such a connection, though alluded to in the order, was of no significance to the actual basis for the decision. The order was neither based upon nor limited in application to the facts of the case. Appeal, therefore, is not barred by the double jeopardy clause of the fifth amendment. [Footnotes omitted.]

While we believe the court of appeals correctly concluded that in fact the district court order was based solely on "the indictment's failure to state and the statute's failure to require a nexus with interstate commerce" and cannot be labeled an acquittal, we submit that, even if the district court relied on facts adduced at trial and intended to direct an acquittal,

the double jeopardy clause would only bar a "subsequent prosecution for the same offense" (*United States* v. *Ball,* 163 U.S. 662, 671) and not an appeal, which merely seeks to compel the entry of a judgment in accordance with the verdict of guilty returned by the jury.

United States v. *Sisson,* upon which petitioner relies, is inapposite. There the district court entered a post-trial order, which it denonimated an order "in arrest of judgment," terminating the prosecution in favor of the defendant. The determination in *Sisson* that the government could not appeal from that order, because it was "in fact an acquittal," was predicated on the fact that the order of the district court was "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at trial" (399 U.S. at 288). Accordingly, it was held that the action could not be distinguished from a directed judgment of acquittal entered notwithstanding a jury verdict of guilty under Rule 29(b) of the Federal Rules of Criminal Procedure (399 U.S. at 290). Since Congress had not provided for appeals from such orders under the old Criminal Appeals Act, the appeal by the government was dismissed.

The present case is quite distinguishable from *Sisson.* Unlike *Sisson,* this is not an appeal under the old Criminal Appeals Act, which was strictly construed against the right of the government to appeal. More significantly, the holding in *Sisson,* despite some dicta in the opinion (399 U.S. at 289–290), did not rest on

the double jeopardy clause. Rather, the decision was based on a determination of the "Court's jurisdiction over the appeal under 18 U.S.C. 3731 [1964 ed.]." See *United States* v. *Jorn*, 400 U.S. 470, 478, n. 7. See also *United States* v. *Findley*, 439 F. 2d 970 (C.A. 1), cited with approval in *United States* v. *Brewster*, 408 U.S. 501, 506, where, commenting on *Sisson*, the Court of Appeals for the First Circuit stated (439 F. 2d at 973): "Collectively we believe this was an approach not in terms of double jeopardy, but in terms of the kind of error [the prior] section 3731 was intended to cover."[4]

3. While admitting that Congress has the power to regulate intrastate transactions in marijuana, heroin, amphetamines, and barbiturates, petitioner argues that there is no basis for federal regulation of intrastate cocaine transactions. As was noted long ago in *United States* v. *Darby*, 312 U.S. 100, 121, Congress may regulate "intrastate commerce * * * that all must be regulated if the interstate commerce is to be effectively controlled." See also *Perez* v. *United States*, 402 U.S.

---

[4] The courts of appeals have since held (either explicitly or implicitly) that where the only relief the United States seeks on appeal is to compel the entry of a judgment of conviction in accordance with the verdict of the jury, as was the case in *Sisson*, the double jeopardy clause does not bar appellate review. *United States* v. *Weinstein*, 452 F. 2d 704, 711, n. 10, 713 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917; see also, *United States* v. *Whitted*, 454 F. 2d 642 (C.A. 8); *United States* v. *Real*, 446 F. 2d 40 (C.A. 9). The double jeopardy clause bars an appeal only where the relief sought requires "that the petitioners be tried again for the same offense" of which they were acquitted. *Fong Foo* v. *United States*, 369 U.S. 141, 143.

146. This Court recognized in *Turner* v. *United States*, 396 U.S. 398, 419, n. 39, 423, that cocaine legitimately manufactured is often the subject of theft and later illicit distribution. Thus, the findings contained in 21 U.S.C. 801 (Pet. App. 10–11), upon which Congress based the federal regulation of intrastate transactions of a multitude of drugs, must certainly be held to apply to cocaine. See *United States* v. *Lopez*, 459 F. 2d 949 (C.A. 5).[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT H. PLAXICO,
Attorneys.

DECEMBER 1973.

[5] Cocaine is not, as petitioner implies, only a recent subject of federal regulation. 21 U.S.C. (1964 ed.) 174, repealed by the statute in the instant case (Pub. L. 91–513, 84 Stat. 1291), prohibited the sale of cocaine and other drugs illegally imported, when the seller knew them to be imported illegally, and provided that knowledge of the illegal importation was presumed from possession. This, for all intents and purposes, permitted federal regulation of local transactions in cocaine. When this presumption was rejected in *Turner*, *supra*, the current statute, based upon the federal power to regulate interstate and related intrastate commerce instead of the federal power over foreign imports, was enacted to accomplish the same ends.

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No. 73-432

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTHONY ESPOSITO,

Petitioner.

PETITIONER'S REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-432

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTHONY ESPOSITO,

Petitioner.

PETITIONER'S REPLY BRIEF

In its brief (pp. 6, 8-9), the government quotes from a Senate Judiciary Committee Report (S. Rep. No. 91-1296, 91st Cong., 2d Sess.) in support of its argument that the amended Criminal Appeals Act should be construed as broadening the government's right of appeal in criminal cases, and that as broadened it would permit appeal in this case.

The Senate Judiciary Committee Report, on which the government relies, referred to Senate Bill 3132. But Senate Bill 3132 was significantly different from the amendment to the Criminal Appeals Act which was ultimately enacted. Senate Bill 3132 provided:

> "Except as otherwise expressly provided by this section, in a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information *or terminating a prosecution in favor of a defendant* as to any one or more counts, except that no appeal shall lie from a judgment of acquittal." (Emphasis added.)

In the version finally adopted, the italicized portion above was eliminated altogether, and the portion relating to acquittals deleted in favor of "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

The Conference Committee which redrafted the proposed amendment gave no reason for the change from the Senate draft. The Third Circuit Court of Appeals has concluded that the apparent reason for the change was that "the Senate's draft would have permitted appeals in cases where the double jeopardy clause would have prohibited them." *United States* v. *Pecora,* 484 F.2d 1289, 1293-4 (3d Cir. 1973).

The government argues that the change was made "merely to confirm that the amendment was not meant to infringe upon the constitutional right against double jeopardy" (p. 9). As we point out above, the legislative history is silent as to the reason for the change. Even if it were made for the reason stated by the government, that explains only the rewriting of the last phrase and not the very significant change in the description of the types of orders from which appeal is permitted.

The deletion of the critical phrase "terminating a prosecution in favor of a defendant" significantly narrowed the types of orders from which an appeal could be prosecuted.

Its elimination calls into question any prior expressions of Congressional purpose to broaden to constitutionally permissible limits the government's right to appeal in criminal cases.

In any event, the government's brief recognizes the importance of the question presented and the absence of any definitive resolution of it.

In response to our additional argument that the District Court's order was an acquittal, precluding appeal, the government takes the position that even if it was an acquittal, appeal is justified under the newly amended Criminal Appeals Act (18 U.S.C. § 3731). The Solicitor General argues that a government appeal, if successful, would result in a judgment in accordance with the jury verdict and not in a new prosecution and that therefore it is not contrary to the double jeopardy clause. (pp. 11-12.)

That argument contradicts constitutional precepts declared by this Court over the last century that "an acquittal can 'not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . .' " *United States* v. *Sisson*, 399 U.S. 267, 289 (1970). See also *Kepner* v. *United States*, 195 U.S. 100, 130 (1904). However, the fact that the Solicitor General interprets the newly amended act as justifying governmental appeal from directed post verdict acquittals and claims that it is applicable to the instant case, fully justifies review and resolution by this Court of the issue. It is a question with serious constitutional and administrative implications and its resolution will have a profound effect on federal criminal jurisprudence.

We submit that the government's Brief in Opposition merely emphasizes the importance and difficulty of the issues involved and the necessity for a full review on the merits by this Court.

Respectfully submitted,

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